

FEDERAL COURT OF AUSTRALIA

Chun v Minister for Immigration & Citizenship [2007] FCA 297

**JUNG HWA CHUN v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND
MIGRATION REVIEW TRIBUNAL
NSD 2526 OF 2006**

**KIEFEL J
4 MAY 2007
SYDNEY**

NO POINT IN PRINCIPLE

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 2526 OF 2006

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: JUNG HWA CHUN
Appellant**

**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGE: KIEFEL J

DATE OF ORDER: 4 MAY 2007

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to “*Minister for Immigration and Citizenship*”.
2. The appeal is dismissed.
3. The appellant pay the first respondent’s costs of the appeal fixed in the sum of \$2 500.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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**BETWEEN: JUNG HWA CHUN
Appellant**

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First Respondent**

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JUDGE: KIEFEL J

DATE: 4 MAY 2007

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 1 The appellant appeals from the decision of the Federal Magistrates Court which dismissed her application for review of the decision of the second respondent. The Migration Review Tribunal had affirmed the decision of the Minister's delegate to refuse the appellant's application for a partner (Spouse 820/801) visa.

2 2 The appellant accepts as accurate the background set out in the submissions for the first respondent:

‘3. *The appellant is a citizen of the Republic of Korea. She arrived in Australia on 16 October 2003 on a Prospective Marriage (Temporary) (Class TO) visa subclass 300 (Prospective Marriage). On 9 July 2004, the appellant lodged an application for a Partner (Residence) Subclass 801 Spouse visa. The appellant lodged the application at the Perth Office of the then Department of Immigration and Multicultural Affairs (the Department), and in the application gave a Perth address as her residential address.*

4. *The appellant had been to Australia before. She had previously held a number of Class UA visas and student visas between 1991 and 1998, the most recent of which had been granted on 5 January 1996. When*

that visa expired on 6 April 1998, the appellant remained in Australia; she was detained in October 2001 after being apprehended by officers of the Department at a massage parlour in Bondi Junction, and returned to Korea on 3 November 2001.

5. *The appellant's Sponsor was Gregory Wilhelmus Hamilton. The appellant and Sponsor claimed that they met in February 2001 at a Buddhist temple in Wollongong. At that time, they were both living in Sydney. When the appellant left Australia in 2001, the Sponsor followed her to Korea, where they claimed to have lived in a de facto relationship. In about March 2003, the Sponsor returned to Australia, and between May and October the appellant lived in Bali at the Sponsor's expense, on the basis that it was closer to Australia than Korea.*
6. *Following her arrival in Australia in October 2003, the appellant lived in Perth with the Sponsor and the Sponsor's sister. In about February 2004, the appellant moved to Sydney to be near friends, and on 5 May 2004 she was apprehended by officers of the Department at the same massage parlour at which she had been apprehended in 2001. In June 2004, the appellant returned to Perth, and on 8 July 2004 she married the Sponsor. The only guest at the wedding was a friend of the Sponsor.*
7. *On 10 September 2004, a delegate of the Minister rang the appellant in Perth to arrange an interview, but was told by the Sponsor that she was working in Sydney. The delegate confirmed this on speaking with the appellant, who agreed to return to Perth for an interview on 15 September 2004. Both the appellant and the Sponsor were separately interviewed on that date. On 2 December 2004, the appellant was again interviewed by the delegate. The delegate had attempted to visit the appellant at her home on 30 November 2004; the appellant initially maintained that she had been in Perth at that time, but subsequently stated that she had been in Sydney at a Buddhist temple.'*

3 3 The criteria for the visa in question required the appellant to continue to be the spouse of her sponsoring spouse. Regulation 1.15A of the Migration Regulations 1994 (Cth) provides that a person is the spouse of another if they are in a married relationship and they are in a married relationship if, inter alia, the relationship between them is genuine and continuing. In relation to this issue the Tribunal found as follows:

- '81. *In the Tribunal's view there is no evidence to suggest that the marriage was contrived according to the meaning of the word as discussed by Justice Lee at first instance in Dhillon v Minister for Immigration, Local Government and Ethnic Affairs (1989) 17 ALD 552 at 555 and noted on appeal (supra).*
82. *In this case the visa applicant maintains that she is in a spouse relationship with the sponsor, notwithstanding her claims that he has*

in the past physically abused her and that she has spent the majority of her time in Australia since October 2003 in Sydney rather than(sic) in Perth with the sponsor. In the context of a claimed 5 year relationship there are relatively few documents supporting the relationship in terms of:

- *Photographs of the couple together in a variety of places and with a variety of people; or*
- *Documents in joint names or many joint financial arrangements; or*
- *Recent detailed statements in support of the relationship provided by the sponsor or their friends.*
- *Indications from the sponsor that he is in a genuine and continuing relationship with the review applicant.*

83. *In this case, there are a number of factors which while of themselves are not determinative of the outcome, but the combination of which, tend to indicate to the Tribunal that there is insufficient satisfactory evidence of the couple being in a genuine and continuing relationship at the time of application or at the time of decision. These factors include:*

- *The fact that the visa applicant has spent the majority of time since the couple's marriage living and working away from the sponsor.*
- *The lack of evidence reflecting the couple's commitment to one another, especially the sponsor's commitment to the visa applicant.*
- *The couple married in a very small ceremony with only one witness. The lack of the sponsor's family members attending the wedding.'*

4 4 The Tribunal concluded that the visa applicant was not a spouse as defined and did not meet the essential criteria for the grant of the visa in question.

5 5 The appellant's case before the Federal Magistrate, which was repeated upon this appeal, focused upon the finding recorded in par 81 of the Tribunal's reasons that '*there is no evidence to suggest that the marriage was contrived*'. It was submitted that that finding is inconsistent with the conclusion reached by the Tribunal and was inconsistent with, or made irrelevant, the fact that the couple married in a very small ceremony with only one witness, which the Tribunal identified as relevant to the question of the genuineness of the relationship. It was further submitted that the Tribunal had adopted a test not found in the statute, namely whether there was '*sufficient satisfactory evidence*' of a married relationship.

6 The Tribunal had noted that the motive for a marriage is irrelevant to the question raised by the criteria, referring to *MILEA v Dhillon* (Federal Court of Australia, Full Court, 8 May 1990, unreported). It was in that context, the Federal Magistrate observed, that the Tribunal went on to say that, in its view, there was no evidence to suggest that the marriage was contrived according to the meaning of the word as discussed in that case. In *MILEA v Dhillon* the dictionary meaning of the word was discussed. The Federal Magistrate observed that it was not easy to reconcile the word as defined with the reasons for decision, which placed emphasis upon the fact that the couple married in a very small ceremony with only one witness and in the absence of members of the sponsor's family. His Honour considered that the Tribunal might have been simply saying that there was no **positive** evidence supporting the proposition that the marriage was contrived, as discussed in *Dhillon's* case. His Honour went on:

'Taking the Tribunal's reasons as a whole, (and accepting the force of the High Court's decision in Wu Ling Shan [Minister for Immigration and Ethnic Affairs v Wu Shan Ling (1996) CLR 259]), in my opinion one must accept, whatever infelicities of drafting there may be in the Tribunal's reasons for decision, that the Tribunal did not regard the marriage of the Sponsor and the Applicant as being free from question. The matters set out in paragraph 83 of the Tribunal's decision are clearly to this effect.'

7 His Honour then turned to consider whether the Tribunal had fallen into jurisdictional error by adopting a test other than that required by the legislation. His Honour observed that the Tribunal was required, if the applicant was to be successful, to reach a state of satisfaction that the applicant was the spouse of the sponsor. That state of satisfaction was to be reached in light of the matters set out in the regulation. Whilst par 83 of the Tribunal's decision might have been better expressed, it was clear, in his Honour's view, that the matters set out were not the only factors that led the Tribunal to the conclusion it reached. Relevantly the Tribunal had said that the factors **included** those matters. Notwithstanding his Honour's reservations as to the possible inconsistency in the paragraphs, he was persuaded that the Tribunal looked at all the evidence before it and properly addressed the matter before it.

8 It was submitted that the finding, that the Tribunal '*did not regard the marriage of the sponsor and the appellant as being free from question*' was not open, for the reason that it is irreconcilable with the Tribunal's statement that there was no evidence that the marriage was contrived. To the contrary of the submission it seems to me that that is the

only view possible in light of the Tribunal's reference to the nature of the ceremony, as his Honour found. Regard must be had to the Tribunals' specific findings in order to consider the earlier statement. The potential for inconsistency cannot negate the finding and what it conveys. Taking it into account one must conclude that the statement in par 81 does not mean that the Tribunal accepted the ceremony as genuine. The dictionary meanings of '*contrive*', to which the Tribunal had regard, refer to the act of persons in plotting, concocting, inventing and devising. The Tribunal may reasonably be understood to say that there was no direct evidence about this, which is what I take his Honour to also have concluded. It was perhaps unnecessary for the Tribunal to have done so. However the Tribunal clearly enough inferred a lack of genuineness in the relationship by reference to the nature of the wedding ceremony, combined with the other factors - the conduct of the relationship and the paucity of evidence concerning their commitment.

9 9 The submissions for the appellant on the test applied by the Tribunal was that it applied a particular level of '*satisfactory evidence*', from which I infer it is said that the Tribunal put the level of satisfaction it was required to reach too high. It is difficult to see how this may be is gleaned from its reference to there being '*insufficient satisfactory evidence of the couple being in a genuine and continuing relationship*'. It seems to me that the Tribunal was saying no more than that there was insufficient evidence which it was prepared to act upon.

10 10 The appeal will be dismissed with costs.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate:

Dated: 4 May 2007

Counsel for the Appellant:	Mr J Young
Solicitor for the Appellant:	Bilias & Associates
Counsel for the Respondent:	Ms A Mitchelmore
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	30 April 2007
Date of Judgment:	4 May 2007